Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-901

MR. ANDREW WOODS, *Petitioner*,

v.

SAFEWAY STORES, INC., *Respondent*.

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 10, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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In compliance with Rule 24(4) of the Rules of the Court, petitioner will limit his response to matters first raised in respondent's opposition.

1. Respondent suggests that there is a "jurisdictional" issue in this case. Such is not the case. Petitioner's charge was filed with the Equal Employment Opportunity Commission ("EEOC") within the requisite 180-day period.[1]

[1] On June 28, 1974, respondent's Employee Relations Manager decided to discharge petitioner. The trial court believed that petitioner's charge was filed on December 30, 1974 and that that date was more than 180 days after the alleged unlawful employment practice occurred. The Court of Appeals allowed the affidavit of the Director of the Washington, D.C. office of EEOC to be filed. In that affidavit, the Director stated under oath that the charge had been filed on December 26, 1974. The EEOC had misfiled the document that reflected the correct filing date. As Christmas, December 25, 1974, was the 180th day after June 28, 1974, the charge was timely filed on December 26, 1974.

2. Respondent suggests that *all* cases of PFB can be treated without indefinite shaving abstinence; that the experts so testified: and that the trial court so held. Such is not the case. Drs. Alexander and Skipworth both testified that medical science has no effective treatment for *some* severe cases of PFB other than indefinite shaving abstinence. Even respondent's own expert corroborated this testimony. Moreover, all branches of the military recognize this medical reality. As there are few, if any, absolutes in science, none testified that the situation is constant and all hope that medical science will discover effective solutions for all. Nonetheless, the reality is that some individuals, like petitioner, can be treated effectively only by indefinite shaving abstinence.

3. Respondent suggests that the experts testified and the trial court found that Dr. Watkins ill-advised petitioner. Such is not the case. Both Dr. Alexander and Dr. Skipworth testified that Dr. Watkins' treatment plan was appropriate in the circumstances.[2] The trial court did not even intimate that Dr. Watkins' advice was anything other than proper.

4. Respondent suggests that petitioner could comply with its grooming code because petitioner was clean shaven at trial. Respondent does not mention that petitioner had shaved prior to trial in order that the trial court could observe the severity of his condition. Moreover, respondent does not mention that the pre-trial shaving caused a severe skin reaction and that at trial

[2] For example, Dr. Skipworth testified as follows:

Q. And what, sir, would you recommend as a course of treatment for the plaintiff?

A. To this point in time, the only effective treatment that I can—would recommend, would be to grow a beard.

petitioner had in excess of 100 papules on his face and some pustules.[3]

5. Respondent suggests that petitioner could have complied with its grooming code; that the experts so testified; and that the trial court so held. Such is not the case. Respondent suggests that petitioner could have complied because several years earlier he had used a depilatory once a month for about a year without adverse reaction, but respondent does not mention that when petitioner used the depilatory more frequently to comply with respondent's code, he had a severe reaction. Dr. Watkins testified that petitioner informed him of his prior shaving experiences and that in his judgment, petitioner's condition required indefinite shaving abstinence. The trial court did not question the propriety of Dr. Watkins' judgment and both Dr. Alexander and Dr. Skipworth testified that it was proper.

6. Respondent states that petitioner was offered a position in its warehouse, but does not state that the warehouse was some 80 miles from petitioner's home and that the trial court found that it "was not a financially feasible alternative".[4]

7. Respondent suggests that the opinion of the court below is consistent with the holding in *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (*en banc*). Such is not the case. In the *Smith* case, the court of appeals presumed that a "business necessity"

[3] There are photographs in the record of petitioner's appearance immediately before trial. In addition, there is extensive testimony by Dr. Skipworth in which he described petitioner's condition at trial.

[4] See 19a of Appendix to Petition.

existed for the employer's requirement that a manual laborer have a "good back". Here, the lower court found no "business necessity" for the discharge of petitioner, but nonetheless held that the discharge was lawful because a "business purpose" existed.

8. Respondent suggests that petitioner seeks in this Court to set aside the factual findings of the lower court. Such is not the case. This case presents important legal—not factual—questions for review. The lower court found that respondent discriminated against petitioner on the basis of his race, but further found that such discrimination was permissible because respondent had a "business purpose" for its treatment of petitioner. That decision is contrary to the holdings of this Court and several courts of appeal. It is that holding, and not the factual findings, that petitioner seeks to set aside.

9. Finally, respondent suggests that this controversy affects only petitioner and respondent. Such is not the case. The briefs of the National Medical Association and the National Black Veterans Organization alone dispel that suggestion.

CONCLUSION

For the reasons stated in the petition and the briefs of the movants, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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January 10, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1979, three copies of the foregoing Petitioner's Reply to Opposition to Petition for a Writ of Certiorari were sent by first class mail, postage prepaid to each of the following: James Patrick McElligott, Jr., Esq., attorney for respondent, of the firm of McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219; Lawrence S. Blumberg, Esq., counsel for National Medical Association, One Rockefeller Plaza, Suite 1915, New York, New York 10020; and John W. Garland, Esq., counsel for National Black Veterans Organization, of the Center for Law and Social Policy, 1751 N Street, N.W., Washington, D.C. 20036.

/s/ ROBERT B. FITZPATRICK